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10 ***Attorneys for Plaintiff***

11 **UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 WALTER DIAZ, on behalf of himself ) Case No. 3:15-cv-04833  
14 and all others similarly situated, )  
15 Plaintiff, ) JOINT DISCOVERY PLAN  
16 vs. ) PURSUANT TO F.R.C.P. 26(f)  
17 )  
18 COLLECTO, INC. DBA EOS CCA, ) HON. CHARLES R. BREYER  
19 Defendants. ) DATE: FEBRUARY 12, 2016  
20 ) TIME: 8:30 A.M.  
21 ) CTRM: 6  
22 )

23 Plaintiff WALTER DIAZ, INDIVIDUALLY AND ON BEHALF OF ALL  
24 OTHERS SIMILARLY SITUATED (“Plaintiff”) and Defendant COLLECTO,  
25 INC. (“Defendant”) jointly submit this report in accordance with Rule 26(f) of the  
26 Federal Rules of Civil Procedure.

1    1. **STATEMENT OF THE CASE**

2    **Plaintiff:** This class action lawsuit concerns Defendant's secret recording of  
 3    telephone calls with the Plaintiff and California residents, thereby invading their  
 4    privacy, and violating California's Penal Code §§ 632 and 632.7 et seq. In 1967,  
 5    the California Legislature enacted the California Invasion of Privacy Act in  
 6    response to advances in science that led to the development of new devices and  
 7    techniques used to eavesdrop upon private communications, resulting in an  
 8    invasion of privacy that poses a serious threat to the free exercise of personal  
 9    liberties that cannot be tolerated in a free and civilized society. Such an invasion of  
 10   privacy is deemed so serious that statutory fines of \$5,000 per violation of this  
 11   statute, located in California's Penal Code, may be award to the victims of unlawful  
 12   monitoring and/or recording of confidential communications without their consent,  
 13   in a private civil action.

14       Plaintiff alleges that Defendant's policy and practice is to record the  
 15   conversations it has with consumers, but fail to adequately disclose that said  
 16   conversations are being recorded, at the outset of those calls. The calls generally  
 17   are made for purposes of collecting debts, and necessarily discuss confidential  
 18   information, including names, social security numbers, and other personal  
 19   identifying information, as well as financial matters. The California Supreme  
 20   Court has stated it is plausible that California residents have an objectively  
 21   reasonable expectation that their private telephone conversations will not be  
 22   recorded without at least a call recording advisement given at the outset of their  
 23   calls, since California residents are accustomed to such common and wide-spread  
 24   practice among companies that do business in California.

25       **Defendant:**

26       Defendant denies that Plaintiff and/or his putative class was recorded  
 27   without consent, as it has an automated recording warning for inbound calls.

1 Defendant asserts that the October 21, 2014 inbound call to Defendant was  
2 subject to the automated inbound recording warning. Such an inbound recording  
3 warning argues against an objectively reasonable expectation that calls with  
4 Defendant are not overheard or recorded (“confidential”) and established implied  
5 consent to recording further calls. Defendant asserts that the October 23, 2014  
6 phone call to Plaintiff was not to a cell phone and therefore Plaintiff lacks  
7 standing to assert a 632.7 class based on this call.

8 2. SUBJECT MATTER JURISDICTION

9 This Court has Diversity jurisdiction under 28 U.S.C. § 1332.

10 3. LEGAL ISSUES

11 Plaintiff: Plaintiff anticipates that the following legal issues will be resolved  
12 by the Court, among others:

- 13 i. Whether Defendant recorded telephone conversations between its  
14 representatives and California Class members without their knowledge;
- 15 ii. Whether Defendant obtained consent from all parties to recorded  
16 telephone conversations between its representatives and California Class  
17 members;
- 18 iii. Whether Defendant’s conduct violated California’s Invasion of Privacy  
19 Laws (i.e., Cal. Pen. Code § 632.7) and Constitutional Right to Privacy  
20 (Cal. Const., Article I, § I);
- 21 iv. Whether Defendant’s conduct was negligent;
- 22 v. What is the nature and extent of damages and other remedies to which the  
23 conduct of Defendant entitles the California Class members; and
- 24 vi. Whether a class action may be certified in this case.

25 Defendant:

26 Including the legal issues set forth above, other legal issues include:

- 27 vii. How far into a conversation is considered the “outset” of a

1 conversation

- 2 **viii.** Whether California's IPA is unconstitutionally vague.
- 3 **ix.** Whether the individualized inquiries presented by Collecto's inbound  
4 automated warning and live outbound recording warning render  
5 Plaintiff's class uncertifiable.
- 6 **x.** Whether Plaintiff has typicality and adequacy to assert an outbound call  
7 class under 632.7 based on an outbound call to a landline.
- 8 **xi.** Whether Plaintiff has typicality and adequacy to assert an outbound call  
9 class under 632.7 based on an inbound call.
- 10 **xii.** Whether Plaintiff's putative classes are ascertainable
- 11 **xiii.** Whether any alleged lack of recording warning to a class member is  
12 subject to a defense of mistake of fact pursuant to *Penal Code* 26(3) or  
13 defense of no evil design, intention, or culpable negligence pursuant to  
14 *Penal Code* 26(5).
- 15 **xiv.** Whether Plaintiff has pleaded a sufficient invasion privacy to trigger  
16 an IPA claim.

17 4. **AMENDMENT OF PLEADINGS AND ADDITIONAL PARTIES**

18 At this time, the Parties do not anticipate amending the pleadings, or adding  
19 any parties to this action.

20 5. **DAMAGES**

21 Plaintiff: Plaintiff argues that statutory damages for violation of California's  
22 Invasion of Privacy Act, according to Cal. Pen. Code § 637.2, may be awarded on  
23 a per violation basis, as indicated by California Supreme Court authority (of \$5000  
24 per violation), and in keeping with the significant purpose of the statute to protect  
25 the important privacy rights of Californians, without the need to prove actual  
26 damages.  
27

1           Defendant:

2           Defendant denies that Plaintiff is entitled to damages.

3        6. INSURANCE

4           Plaintiff: None.

5           Defendant: Plaintiff's claim may be subject to insurance. Currently  
6 investigating applicable policy.

7        7. MOTIONS

8           Plaintiff: Plaintiff contemplates filing a motion for class certification, at the  
9 appropriate time, and after Plaintiff has had a reasonable opportunity to conduct  
10 discovery. Plaintiff anticipates filing his motion seeking class certification in  
11 October 2016.

12          Defendant: Defendant requests the following briefing schedule for any motion  
13 for class certification: four weeks for Opposition and two weeks for a reply.

14          Defendant also intends to file a motion for judgment on the pleadings as to  
15 Plaintiff's class claims as they are unconstitutionally vague (*See People v.*  
16 *Melongo*, 2014 IL 114852, 6 N.E.3d 120 (similar Illinois statute invalidated)) and  
17 that on the grounds he does not allege sufficient invasion of privacy for his class.  
18 *See In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1042 (N.D. Cal. 2014) ("In sum,  
19 because Plaintiffs do not plead sufficient facts to allege an invasion of privacy,  
20 Yahoo's Motion to Dismiss Plaintiffs' claims for a violation of Article I, Section 1  
21 of the California Constitution is GRANTED. However, the Court grants leave to  
22 amend because Plaintiffs may be able to plead specific email content in specific  
23 emails that may suffice to state the elements of the claim.")

24          Defendant also intends to file a motion for summary judgment.

25        8. MANUAL FOR COMPLEX LITIGATION

26          The parties believe that this is not a complex case as it does not involve  
27 "complex legal issues, multiple parties, difficult legal questions or unusual proof  
28

1 problems.” Fed. R. Civ. Proc. 16(c) (2)(L). Therefore, the Manual for Complex  
2 Litigation should not be utilized in this case.

3 **9. STATUS OF DISCOVERY**

4 Plaintiff has drafted written discovery and will be serving it in advance of the  
5 Scheduling conference. Defendant requests that class discovery be stayed pending  
6 a decision on its motion for judgment on the pleadings.

7 **10. DISCOVERY PLAN**

8 Plaintiff: Plaintiff will be seeking the following categories of documents in  
9 discovery. Plaintiff may need additional categories of documents depending on  
10 what information is provided to Plaintiff and depending on how Defendant  
11 maintains their records:

- 12 1. Any and all scripts used by Defendant's employees when speaking with  
13 putative class members;
- 14 2. Documentation regarding Defendant's outbound and inbound dial list,  
15 or other call records evidencing the inbound and outbound calls made  
16 between class members and Defendant;
- 17 3. Documentation regarding Defendant's policies and procedures for  
18 inbound and outbound calls; and,
- 19 4. A sampling of recordings of phone calls between Defendant and putative  
20 class members;

21 With regard to the written discovery and depositions that Plaintiff intends on  
22 conducting, Plaintiff would respectfully submit that no limitations or phases should  
23 be imposed on conducting the discovery.

24 Defendant:

- 25 1. Defendant will be seeking documents showing that whether  
26 Plaintiff's phone number(s) at issue are either cell phones or landline phone  
27 numbers and call records

1           2. Defendant will be taking Plaintiff's deposition with respect to his  
2 knowledge of call recording practices of businesses.

3       11. DISCOVERY CUT-OFF

4           Plaintiff: Plaintiff requests that a discovery cut-off be set by this Honorable  
5 Court, *after* Plaintiff's Motion for Class Certification has been fully briefed and  
6 ruled upon. As a second option, Plaintiff has provided proposed discovery cut-off  
7 dates in the timetable below, if the Court would prefer to set such deadlines at this  
8 juncture.

9           Defendant: Defendant asserts that class discovery at this early juncture is  
10 disproportionate compared to likely benefit pursuant to Fed. R. Civ. P. 26(b)(1).  
11 Defendant intends to file a motion for judgment on the pleadings as to Plaintiff's  
12 class claims as they are unconstitutionally vague.

13       12. EXPERT DISCOVERY

14           Plaintiff: Plaintiff anticipates designating expert witnesses in order to support  
15 his claims. If this matter is certified as a class action, Plaintiff may require  
16 additional expert testimony and, thus, further expert discovery. Plaintiff believes  
17 that the deadline for expert designations should be set after the Court rules on  
18 Plaintiff's Motion for Class Certification. Plaintiff has provided proposed  
19 discovery cut-off dates in the timetable below, if the Court would prefer to set such  
20 deadlines at this juncture.

21           Defendant: Defendant does not oppose setting an expert deadline after the  
22 Court rules on Plaintiff's Motion for Class Certification

23       13. DISCOVERY OF ELECTRONICALLY MAINTAINED INFORMATION

24           Plaintiff: Plaintiff believes Defendant possess electronic evidence of the  
25 outbound and inbound call logs, evidencing calls made between Defendant and  
26 Plaintiff and the Class, as well as recordings thereof. Plaintiff will demand the  
27 production of such records in their native electronically maintained format.  
28 Further, Plaintiff will be requesting a sample of recordings of phone calls between

1 Defendant and Class Members, which may be maintained electronically. Plaintiff  
2 is not aware of and *specific* electronically-stored information, but reserves the right  
3 to demand the production of such information in a form and method that is feasible  
4 for both parties, in the future.

5 If Plaintiff's need for any such information becomes apparent, Plaintiff will  
6 meet and confer with Defendant, to determine what form and method of production  
7 is feasible for both parties.

8 Defendant: Defendant objects to this burdensome class discovery as it is  
9 disproportionate likely benefit pursuant to Fed. R. Civ. P. 26(b)(1). Defendant  
10 intends to file a motion to dismiss Plaintiff's class claims as they are  
11 unconstitutionally vague.

12 **14. SETTLEMENT**

13 Plaintiff requests private mediation pursuant to Local Rule 16-15.4.  
14 Defendant requests settlement before the magistrate judge.

15 **15. TRIAL ESTIMATE**

16 Plaintiff believes that the length of trial will take anywhere from 7 to 10 days,  
17 perhaps longer, depending on the number of putative class members involved and  
18 the extent of documentary evidence that may be produced by Defendant.

19 Defendant estimates a 3-5 day trial:

20 **16. TRIAL COUNSEL**

21 Plaintiff: Plaintiff will be represented by Todd M. Friedman and Adrian R.  
22 Bacon at trial.

23 Defendant: Defendant will be represented by David J. Kaminski and Stephen  
24 A. Watkins.

25 **17. INDEPENDENT EXPERT OR MASTER**

26 The parties do not believe that this is a case in which the Court should consider  
27 appointing a master pursuant to Fed. R. Civ. P. 53 or an independent scientific  
28 expert.

18. TIMETABLE

Matter	Plaintiffs' Request	Defendant's Request
Deadline to Amend Pleadings	April 11, 2016	April 11, 2016
Non-Dispositive Motion Cut-Off	February 6, 2017	February 6, 2017
Class Certification Filing Deadline	October 2016	October 2016
Initial Expert Disclosure	October 31, 2016	October 31, 2016
Rebuttal Expert Disclosure	November 21, 2016	November 21, 2016
Non-Expert Discovery Cut-off	December 5, 2016	December 5, 2016
Expert Discovery Cut-Off	December 19, 2016	December 19, 2016
Settlement Conference Completion Date	October 2016	October 2016
Motions in Limine Filing Deadline	March 13, 2017	March 13, 2017
Deadline to File Dispositive Motions	January 23, 2017	January 23, 2017
Pretrial Conference	March 3, 2017	March 3, 2017
Trial (Est. days)	March 20, 2017	March 20, 2017

## 19. OTHER ISSUES

21 Plaintiff: Plaintiff anticipates that issues relating to claims of privilege may  
22 arise given the highly sensitive nature of the matter including the potential  
23  
24

1 disclosure of communications Defendant had with its customers. Plaintiff  
2 anticipates a potential entry of an appropriate stipulated protective order, which  
3 will include a provision for the “claw-back” of inadvertently produced privileged  
4 materials. Plaintiff is agreeable to submitting a stipulated protective order for the  
5 Court’s review and approval, where necessary.

6 Given the nature of the case, Plaintiff is aware of his obligation to preserve  
7 relevant evidence, such as Defendant’s recordings with its customers during the  
8 relevant time periods, including electronically stored information (ESI), and should  
9 be taking steps to comply with his obligations.

10 Defendant: Defendant will submit a proposed protective order to Plaintiff.  
11

12 20. PATENT CASES

13 Not applicable

14 21. MAGISTRATE JUDGE

15 The parties do not consent to have a Magistrate Judge preside over all the  
16 proceedings in this case.

17 Dated: February 9, 2016

**Law Offices of Todd M. Friedman, P.C.**

18  
19 By: /s/ Todd M. Friedman  
20 Todd M. Friedman, Esq.  
21 Adrian R. Bacon, Esq.  
22 Attorneys for Plaintiff

23 Dated: February 9, 2016

**Carlson & Messer, LLP**

24 By: /s/ Stephen Watkins  
25 Stephen Watkins, Esq.  
26 Attorneys for Defendant

## Signature Certification

Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual, I hereby certify that the content of this document is acceptable to Stephen Watkins, counsel for Defendant and that I have obtained Mr. Watkins' authorization to affix his electronic signature to this document.

Dated: February 9, 2016

Law Offices of Todd M. Friedman, P.C.

By: /s/ Todd M. Friedman

Todd M. Friedman, Esq.

Adrian R. Bacon, Esq.

Attorneys for Plaintiff

1 Filed electronically on this 9<sup>th</sup> day of February 2016, with:

2 United States District Court CM/ECF system

3 Notification sent electronically on this 7<sup>th</sup> day of November, 2014, to:

4 Honorable Judge Charles R. Breyer

5 United States District Court

6 Northern District of California

7 David J. Kaminski, Esq.

8 Stephen A. Watkins, Esq

9 Carlson & Messer LLP

10 Attorneys for Defendant

11 s/Tod M. Friedman

12 Todd M. Friedman